Document:-
A/CN.4/SR.2171

Summary record of the 2171st meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
1990, **vol. I**

immemorial and no different solution could be applicable in public international law.

10. As to draft article 9, the Special Rapporteur had refrained from laying down a rule on the actual obligation to pay interest, and had simply specified the point in time from which it should come into operation. The article thus dealt with only a secondary problem and it should state clearly when interest would be due to the aggrieved party. Paragraph 1 stated that interest could be "due for loss of profits", but that was only one instance of injury. There was no reason why interest should not be payable where loss of property had been caused and where the aggrieved State confined its claim to compensation for loss of substance. He agreed that interest should run until the day of effective payment.

11. It was gratifying that the Special Rapporteur had proposed a specific rule on satisfaction, but the scope of draft article 10 should be more clearly defined. The law should indeed impose specific secondary obligations on the author State for moral damage, yet moral damage was more than bureaucratic negligence: it presupposed a certain degree of gravity. Examples could be given—such as the arrest of a diplomat—in which the honour or dignity of a foreign State was encroached upon. Nevertheless, it was a totally different matter when, for instance, a watercourse State failed to inform another of planned works, thereby violating the obligations set forth in article 12 of the draft articles on the law of the non-navigational uses of international watercourses. The Special Rapporteur apparently agreed with that approach by mentioning "moral injury" alongside "legal injury" in draft article 10, but the consequences suggested in paragraph 1, namely apologies, damages, and so on, would automatically apply in all cases of a breach of an international commitment. Such a proposition was exaggerated. Because of the great increase in the volume of international co-operation agreements, breaches often constituted a mere bureaucratic phenomenon. In most cases, it was enough for the aggrieved State to remind the other State of its obligation. The question of punishment of responsible agents or safeguards against repetition did not arise. The draft articles should display some degree of moderation with respect to petty violations of that kind.

12. He categorically rejected the notion of "punitive damages" contained in paragraph 1 of article 10. Actual loss or actual damage could always be assessed; reference to the relevant economic figures was all that was necessary. Punitive damages, on the other hand, automatically called for third-party adjudication. No State would voluntarily agree to be punished. Punitive damages, apart from being contrary to the principle of the sovereign equality of States, were also a practical impossibility. Accordingly, all references to punitive damages should be deleted. The proper place for notions of punishment was in the draft Code of Crimes against the Peace and Security of Mankind. The draft code, however, laid down penalties only against individuals.

13. He agreed with members of the Commission who had stressed that assurances or safeguards against repetition could not be confined to instances of non-material damage. That remedy was also needed, and perhaps even more so, when there was a threat that acts which had caused tangible damage might be repeated. It should also be made clear that material damage and non-material damage were not mutually exclusive. Thus if a mob, which the local police deliberately chose not to contain, set fire to the premises of a foreign embassy, the destruction of the building amounted to material as well as non-material damage. The existence of two separate articles appeared to indicate at first glance that the scope of the two provisions was separated by a clear-cut dividing line.

14. He fully endorsed paragraph 3 of article 10, which reflected the rulings of the International Court of Justice and the European Court of Human Rights. The European Court had ruled that its findings—to the effect that a violation had occurred—played a major role as the appropriate remedy. The Court was extremely reluctant to grant financial compensation in cases of human-rights violations and he knew of only one case in which it had been awarded generously, namely the case of a person who had been deported illegally, in disregard of lawful procedures of extradition.[5]

15. He was opposed to paragraph 4. There had, of course, been cases of humiliating demands made on the author State and the Special Rapporteur's reference to the *Boxer* case (A/CN.4/425 and Add.1, para. 124) was relevant. There was, however, no need to mention the matter in article 10: humiliation had no place in a world of sovereign States that were equal. At most, the matter could be mentioned in the commentary.

16. In conclusion, notwithstanding his partly critical observations, he wished to emphasize his great appreciation for the Special Rapporteur's well-documented report.

The meeting rose at 10.45 a.m. to enable the Drafting Committee to meet.

[5] See the judgment of 2 December 1987 of the European Court of Human Rights in the *Bozano* case, *Publications of the European Court of Human Rights, Series A: Judgments and Decisions*, vol. 124, p. 42, at p. 48, para. 10.

2171st MEETING

Friday, 8 June 1990, at 10.05 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucounas, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

State responsibility (*continued*) (A/CN.4/416 and Add.1,[1] A/CN.4/425 and Add.1,[2] A/CN.4/L.443, sect. C)

[Agenda item 3]

Part 2 of the draft articles[3]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 8 (Reparation by equivalent)

ARTICLE 9 (Interest) *and*

ARTICLE 10 (Satisfaction and guarantees of non-repetition)[4] (*continued*)

1. Mr. OGISO congratulated the Special Rapporteur on his masterly second report (A/CN.4/425 and Add.1) on the complex topic of State responsibility.

2. The various problems which might arise in the application of the rules set forth in draft articles 8 to 10 should be carefully considered with a view to facilitating the peaceful settlement of a dispute between an author State and an injured State. As he had stated at the Commission's thirty-seventh session with regard to draft article 6 as submitted by the previous Special Rapporteur, there were many examples of *ex gratia*, lump-sum settlements in which reparation was not necessarily based on recognition by the author State of the existence of a wrongful act and which therefore did not take the form of payment of compensation corresponding to "the value which a re-establishment of the situation as it existed before the breach would bear".[5] That had been true, for example, in a considerable number of cases relating to damage caused during wartime or damage caused accidentally by warships or military aircraft to merchant ships or commercial aircraft in which the States concerned had agreed on such forms of settlement without recognizing their responsibility as the authors of the damage. Such settlements, which were often classified as "political" or extralegal, fell completely outside the topic of State responsibility.

3. That seemed to have been the approach adopted in part 2 of the draft, which made no mention of such forms of settlement and according to which only legal rules and principles should be included in the draft articles. He wondered whether that was the right approach. Having regard to State practice and to the fact that there were many unsettled cases of potential or alleged internationally wrongful acts causing harm, he considered that the draft articles on reparation should be formulated in such a way that, at least, they did not obstruct or interfere with the attempts of the alleged author State and the injured State to arrive at a peaceful settlement by means of an *ex gratia*, lump-sum settlement or of any other type of political settlement. Accordingly, he considered that an article should be included in the draft stipulating expressly that the forms of reparation provided for under articles 7 to 10 should apply without prejudice to any other form of settlement based on an agreement between the alleged author State and the injured State. Neither article 2 nor article 3 of part 2 as provisionally adopted by the Commission referred to that type of settlement.

4. He agreed with Mr. Graefrath (2168th meeting) and Mr. Tomuschat (2170th meeting) that problems could arise in determining which injured State, as defined in article 5 of part 2, would be entitled to claim which form of reparation, as provided for in draft articles 7, 8 and 10. As a general rule, reparation by equivalent under draft article 8 could be claimed only by the directly injured State. A similar problem might also arise in respect, for instance, of a declaratory judgment of an international tribunal under draft article 10, paragraph 3, bearing in mind that the ICJ, in its 1966 judgment in the *South West Africa* case,[6] had taken a negative stance with regard to an *actio popularis*, whereas article 5 seemed to be based on the existence in international law of obligations *erga omnes*, as had been suggested in the 1970 judgment of the ICJ in the *Barcelona Traction* case.[7] The relationship between article 5, on the one hand, and articles 7 to 10, on the other, therefore required careful consideration by the Commission.

5. Having made those general remarks, he would comment separately on draft articles 8 to 10 submitted by the Special Rapporteur.

6. Two alternatives were proposed for paragraph 1 of draft article 8. Alternative A, in which the Special Rapporteur defined the damage that should be covered by reparation by equivalent by applying the so-called *Chorzów* principle, read: "The injured State is entitled to claim . . . pecuniary compensation . . . in the measure necessary to re-establish the situation that would exist if the wrongful act had not been committed." Not being of English mother tongue, he had some difficulty in understanding the meaning of the words "in the measure". If, as he assumed, they were more or less equivalent to the words "to the extent", there was still uncertainty as to the range of damage to be compensated for. That uncertainty derived, in his view, from

[1] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

[2] Reproduced in *Yearbook . . . 1989*, vol. II (Part One).

[3] Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted on first reading, appears in *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 *et seq.*

Articles 1 to 5 of part 2 of the draft (Content, forms and degrees of international responsibility), which were provisionally adopted by the Commission at its thirty-fifth and thirty-seventh sessions, appear in *Yearbook . . . 1985*, vol. II (Part Two), pp. 24-25. For the texts of the remaining draft articles of part 2, articles 6 to 16, referred to the Drafting Committee by the Commission at its thirty-sixth and thirty-seventh sessions, *ibid.*, pp. 20-21, footnote 66. For the texts of the new articles 6 and 7 of part 2 referred to the Drafting Committee at the forty-first session, see *Yearbook . . . 1989*, vol. II (Part Two), pp. 72-73, paras. 229-230.

Articles 1 to 5 and the annex of part 3 of the draft ("Implementation" (*mise en œuvre*) of international responsibility and the settlement of disputes) were considered by the Commission at its thirty-eighth session and referred to the Drafting Committee. For the texts, see *Yearbook . . . 1986*, vol. II (Part Two), pp. 35-36, footnote 86.

[4] For the texts, see 2168th meeting, para. 2.

[5] *Yearbook . . . 1985*, vol. I, pp. 122-123, 1896th meeting, para. 8.

[6] *South West Africa, Second Phase*, Judgment of 18 July 1966, *I.C.J. Reports 1966*, p. 6.

[7] *Barcelona Traction, Light and Power Company, Limited, Second Phase*, Judgment of 5 February 1970, *I.C.J. Reports 1970*, p. 3.

the phrase "the situation that would exist if the wrongful act had not been committed", because the situation to be re-established was not clearly specified and might not lend itself to application of the *Chorzów* principle. Would the injured State be justified in claiming increased compensation because the agreed compensation would not suffice to "re-establish the situation that would exist if the wrongful act had not been committed"? To illustrate his point, he gave the following example. Supposing that State A bombed and destroyed a dam in State B by mistake and that both States agreed on the amount of compensation State A should pay for that internationally wrongful act, the amount being calculated on the basis of the expected cost of rebuilding the dam; and supposing further that, after the agreement was signed but before the work was completed, flooding caused severe damage in State B, could State B invoke alternative A, in particular the words "the situation that would exist", to claim increased compensation? He assumed that alternative A was designed to re-establish the situation that "would" exist at the time of the agreement if the wrongful act had not been committed and that, in that case, the claim by State B would not be justified, having regard in particular to the fact that there was no "uninterrupted causal link" as required under paragraph 4. Alternative A was not clear on that point, however.

7. Alternative B, which also contained the phrase "the situation that would exist if the internationally wrongful act had not been committed", was in addition ambiguous on the question of the point or stage at which the injured State was entitled to claim pecuniary compensation and made such a claim subject to the condition: "If and in the measure in which the situation that would exist if the internationally wrongful act had not been committed is not re-established by restitution in kind . . .". Did that mean that the injured State could exercise the right to claim pecuniary compensation only after it had been established, by agreement, that restitution in kind was impossible? Or did it mean that the injured State could claim pecuniary compensation if and to the extent that the re-establishment of the situation that would exist if the internationally wrongful act had not been committed was deemed to be materially impossible? If the former interpretation was correct, the injured State would be prevented from making a timely claim for pecuniary compensation, and that would be contrary to the objective of facilitating a practical solution to disputes arising out of internationally wrongful acts. It seemed, despite the reference to "the provisions of article 7" that the problem could not be solved.

8. With regard to paragraph 2 of article 8, he said that he agreed with those members of the Commission who considered that the expression "economically assessable" could pose a problem, for the question could arise, first, whether all damage was "economically assessable" and, secondly, how the assessment was to be made. He would like the paragraph to provide expressly that the assessment of the damage, if not agreed between the parties, should be referred immediately for third-party settlement. That would help to facilitate practical solutions to disputes.

9. He supported paragraph 3 because of its concise reference to the principle of compensation for loss of profits (*lucrum cessans*). In the absence of detailed rules of international law on the matter, however, he believed that the formulation of more specific provisions on the issue would not serve the purpose of the draft articles.

10. Commenting briefly on draft article 9, concerning interest, which, according to the Special Rapporteur, was "obviously a part of" *lucrum cessans* (A/CN.4/425 and Add.1, para. 78), he said that, while he appreciated the Special Rapporteur's efforts to discern rules of international law on that complex issue and to contribute to the progressive development of international law in the area, he believed that the Commission should refrain from formulating too detailed rules on such issues as the rate of interest and compound interest, on which international law was not clear.

11. With regard to paragraph 1 of draft article 10, he said that, in addition to the point concerning the meaning of the words "in the measure" which he had raised in connection with article 8, he would like to have clarifications concerning the phrase "moral or legal injury not susceptible of remedy by restitution in kind or pecuniary compensation" and concerning its legal consequences as provided for in that paragraph. According to the explanations given by the Special Rapporteur in his report, "the 'moral' damage to the State so described is in fact distinct . . . in particular, from the 'private' moral damage to nationals or agents of the State" and, furthermore, such "moral damage to the State" notably consisted "on the one hand, in the infringement of the State's right *per se* and, on the other, in the injury to the State's dignity, honour or prestige" (*ibid.*, para. 14). Moreover, the Special Rapporteur characterized the first kind of injury as "legal", since it was an effect of any infringement of an international obligation. In that connection, he would like to have clarifications on two points. First, although "private" moral damage to agents of the State was distinct from moral damage to the State, were certain kinds of "private" moral damage, such as insults addressed to high-ranking agents of a State, assimilated in principle to "moral damage to the State"? Secondly, if legal damage was such damage as was an "effect of any infringement of an international obligation", could it not be said that almost all internationally wrongful acts would cause "legal" injury to the other State or States, even where physical injury was caused to nationals of the State or States concerned, and that, consequently, in all those cases the author State would be under an obligation to provide the injured State with adequate satisfaction in one of the forms or any combination thereof prescribed in paragraph 1? That might not be what the Special Rapporteur had had in mind. According to State practice, a State which caused "moral or legal injury not susceptible of remedy by restitution in kind or pecuniary compensation" was not always under an obligation to give satisfaction to the injured State in the forms provided for in paragraph 1. In that connection, he wondered whether the Special Rapporteur considered that it was necessary to define the words "moral or legal injury" in the article itself.

12. Still with regard to paragraph 1, although, in the report (*ibid.*, para. 144), the Special Rapporteur described punitive damages as a kind of "self-inflicted" sanction, he wished to associate himself with the negative views expressed in that regard by certain members.

13. Lastly, since paragraph 1 referred to "any combination" of forms of satisfaction, it might also be advisable to refer in the draft articles to the possibility of a combination of reparation by equivalent and some form of satisfaction or guarantees of non-repetition.

14. He agreed with the idea expressed in paragraph 4, which provided that "In no case shall a claim for satisfaction include humiliating demands on the State which has committed the wrongful act...", since humiliating demands were a source of new friction and prevented the parties concerned from reaching an amicable settlement. He considered, however, that the practical problems which might arise in the application of that provision should be borne in mind. Who, for example, would be empowered to judge whether a particular claim was humiliating, since the word "humiliating" was highly subjective? He therefore joined with previous speakers in recommending that the provision be deleted.

15. Mr. NJENGA expressed his appreciation to the Special Rapporteur for his second report (A/CN.4/425 and Add.1), which contained a wealth of case-law and *opinio juris* on the issues of compensation or reparation by equivalent, satisfaction and other forms of reparation. It was, however, a matter of regret that the English mimeographed version of the report contained lengthy quotations from decisions and publications that had been kept in the original language, thereby causing serious problems for those who did not master the language in question. It was to be hoped that, in future, such quotations would be translated.

16. The Special Rapporteur had managed in his report to reflect faithfully the customary international law in the matter, while at the same time raising some issues in the context of contemporary international law. In his systematic and logical approach, the Special Rapporteur had followed in the footsteps of his predecessors, who had contributed immensely to the work of the Commission on the topic. The great respect enjoyed by that work had recently been demonstrated in the international arbitral award handed down on 30 April 1990 in the "*Rainbow Warrior*" case,[8] in which both France and New Zealand as parties and the arbitral tribunal itself had relied on it as representing the customary international law.

17. The point of departure of the law in the matter had been aptly summarized by the PCIJ in the following fundamental principle which it had enunciated in 1927 in the *Chorzów Factory* case (Jurisdiction):

> ... It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention ...[9]

The same principle had been reiterated by the ICJ in 1950 in its advisory opinion on *Interpretation of Peace Treaties* (Second Phase), as follows:

> ... it is clear that refusal to fulfil a treaty obligation involves international responsibility ....[10]

18. The Special Rapporteur had referred to many cases in which that principle had been applied and had extensively analysed the opinions of learned authors, all of whom tended to uphold it. He did not think that the fact that the overwhelming majority of those cases dealt with material damage to property or injury to persons and therefore with situations relating to contracts or tortious liability in any way vitiated the general rule that the breach of an engagement in international law triggered the obligation to make reparation, whether such breach resulted in material damage to the State or its nationals or in what had been referred to as "moral", non-material damage to the State. According to the Special Rapporteur, the latter damage consisted "on the one hand, in the infringement of the State's right *per se* and, on the other, in the injury to the State's dignity, honour or prestige" (*ibid.*, para. 14). The predominance of cases involving material damage arising out of a wrongful act was not, in his view, so much the result of the fact that "moral" damage to the State did not require reparation as of the fact that such damage was not so amenable to arbitration or judicial proceedings for compensation. It did, however, lend itself to the particular form of remedy which the Special Rapporteur termed "satisfaction". He therefore did not agree with Mr. Tomuschat (2170th meeting) that there had been no cases involving "moral" injury to the interests of a State. Moral damage had been involved in the "*Rainbow Warrior*" case relating to the breach of the 1986 agreement between France and New Zealand under which the two criminals who had been involved in the bombing of the Greenpeace International ship were to serve their sentence on the island of Hao, under French jurisdiction, but had been surreptitiously and prematurely repatriated from that island by France. The arbitral tribunal in that case had stated:

> ... the legal consequences of a breach of a treaty, including the determination of the circumstances that may exclude wrongfulness (and render the breach only apparent) and the appropriate remedies for breach, are subjects that belong to the customary law of State responsibility.
>
> The reason is that the general principles of international law concerning State responsibility are equally applicable in the case of breach of a treaty obligation, since in the international law field there is no distinction between contractual and tortious responsibility, so that any violation by a State of any obligation, of whatever origin, gives rise to State responsibility and, consequently, to the duty of reparation. ...[11]

19. It was clear that the nature and extent of the reparation—whether it was reparation for material or moral damage, contractual or tortious, and whether involving injury to the State directly or to individuals—would vary depending on the extent of the damage in question and the culpability of the author or respon-

[8] See 2168th meeting, footnote 4.

[9] *P.C.I.J., Series A, No. 9* (*ibid.*, footnote 5), p. 21.

[10] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase*, Advisory Opinion of 18 July 1950, *I.C.J. Reports 1950*, p. 221, at p. 228.

[11] *International Law Reports*, vol. 82 (see 2168th meeting, footnote 4), p. 551, para. 75.

sible State. Accordingly, most of the cases cited in the report could be considered only as examples, since circumstances could be infinitely variable.

20. He agreed with the Special Rapporteur that reparation by equivalent was governed by the general principle that

> the result of reparation in a broad sense—namely of any of the forms of reparation or a combination thereof—should be the "wiping out", to use the dictum of the *Chorzów Factory* case (Merits), of "all the consequences of the illegal act" in such a manner and measure as to establish or re-establish, in favour of the injured party, "the situation which would, in all probability, have existed if that act had not been committed" (A/CN.4/425 and Add.1, para. 21).

21. He also fully shared the view expressed in the "*Lusitania*" case that punitive and exemplary damages, which were common in internal law, were not applicable in international law because "the fundamental concept of 'damages' is satisfaction, reparation for a *loss* suffered; a judicially ascertained *compensation* for wrong" (*ibid.*, para. 24). It was in that context that the concept of "direct" and "indirect" damage became irrelevant so long as the damage could be attributed to the wrongful act and was not so remote as to have been totally unforeseen. As stated in administrative decision No. II of the United States-German Mixed Claims Commission of 1 November 1923: "It matters not whether the loss be directly or indirectly sustained so long as there is a clear, unbroken connection between Germany's act and the loss complained of." (*Ibid.*, para. 36.)

22. The thorough analysis which the Special Rapporteur had carried out thus presented sufficient authority for the views he expressed as to the way in which the causal link criterion should operate for the purpose of compensation for damage (*ibid.*, para. 42). The "uninterrupted causal link" which formed the basis of draft article 8, paragraph 4, seemed to be taken from the above-mentioned administrative decision No. II of the United States-German Mixed Claims Commission (*ibid.*, para. 39) and from the *Portuguese Colonies* case (Naulilaa incident) (*ibid.*, para. 38), in which the invasion by Germany of the Portuguese colonies had led to a revolt by the indigenous population which had been held to be a predictable event. It should, however, be emphasized that the rule of a direct and uninterrupted causal link had to be applied by the tribunal or other third-party mechanism to exclude damage which, though causally connected with the internationally wrongful act, was too remote in the causal chain or in time or totally unpredictable. He was not at all certain that that point was properly reflected in paragraph 4 of article 8.

23. He nevertheless supported paragraph 5, which correctly reflected the universally accepted principles of internal law relating to the contributory negligence of the injured State or any other circumstance foreign to the author State that had contributed to the occurrence of the internationally wrongful act, as well as to the abatement of damages to the extent of the parties' share of the blame for the injury. The paragraph was in conformity with the general principle that the purpose of reparation was, to the extent possible, *restitutio in integrum*, and not retribution.

24. As to the nature of damage or the scope of reparation by equivalent, he fully concurred with the Special Rapporteur that pecuniary compensation should cover "material" damage suffered by the offended State which had not already been and could not be covered by restitution in kind (*ibid.*, para. 52). That would include both direct damage caused to the territory of the State or to its property, including all its property abroad, and damage caused to the State through the persons, physical or juridical, of its nationals or agents. Whether such damage was referred to as "direct" when caused to the State or as "indirect" when caused to its nationals did not seem very important. The authorities considered by the Special Rapporteur—the "*Lusitania*" case, the *Corfu Channel* case and the *William McNeil* case (*ibid.*, paras. 56-58)—all demonstrated conclusively that such damage, whether "material" or "moral", could give rise to pecuniary compensation.

25. It was, however, difficult to establish whether there was a uniform rule providing for recovery of *lucrum cessans*. He believed that the authorities cited in the report did not justify such compensation, except in certain limited circumstances. As the arbitrator had stated in the *Shufeldt* case involving a claim brought by a United States citizen whose property had been expropriated in Guatemala:

> The *damnum emergens* is always recoverable, but the *lucrum cessans* must be the direct fruit of the contract and not too remote or speculative.
>
> . . . this is essentially a case where such profits are the direct fruit of the contract and may reasonably be supposed to have been in the contemplation of both parties as the probable result of a breach of it. (*Ibid.*, para. 66.)

26. Each case should therefore be considered on its own merits. He believed that damages for expropriation, for example—whether wrongful or not—should be based on adequate compensation for the property expropriated and not on speculative profit, the award of which could be considered as a punitive measure going beyond the scope of the topic. He therefore had grave doubts concerning paragraph 3 of draft article 8, reading: "Compensation under the present article includes any profits the loss of which derives from the internationally wrongful act." It should not be forgotten that, because of a variety of unforeseen circumstances, there was always the risk that expected profits would not materialize; moreover, the possibility of a loss and even of bankruptcy could never be ruled out. If provision was to be made for compensation for *lucrum cessans*, what would happen in the case of an actual loss? The question of interest, to which he would refer later, was, however, a different problem.

27. With regard to paragraph 1 of article 8, he preferred alternative A, which was clearer and framed in a more positive way than alternative B. Unless the Special Rapporteur had a particular reason for preferring alternative B, he believed that the Commission could concentrate at the appropriate time on alternative A, perhaps redrafting it along the lines suggested by Mr. Ogiso.

28. On the basis of the authorities cited by the Special Rapporteur, he was convinced that reparation designed

"to re-establish the situation that would exist if the wrongful act had not been committed" should necessarily include the award of interest, although he did not think that interest could be granted to compensate for loss of profit, as the Special Rapporteur appeared to suggest in the report (*ibid.*, para. 78). Nevertheless, he admitted that "The awarding of interest seems to be the most frequently used method for compensating the type of *lucrum cessans* stemming from the temporary non-availability of capital" (*ibid.*). Whether interest should be paid from the date of the wrongful act, from that of the claim or from that of the award did not seem to be firmly established by judicial practice, since all factors had to be taken into account, including the vigilance or laxity of the claimant. On balance, however, where there were no other considerations to be taken into account, it seemed logical to agree with the Special Rapporteur and with Brownlie that "In the absence of special provision in the *compromis* the general principle would seem to be that, as a corollary of the concepts of compensation and *restitutio in integrum*, the *dies a quo* is the date of the commission of the wrong" (*ibid.*, para. 92). It also seemed logical that interest should cease to run on the date on which compensation was actually paid.

29. It was not generally possible to set a uniform rate of interest for all claims, since decisions in that regard tended to vary. There was a great deal to be said, however, for the reasonable suggestion by Subilia (*ibid.*, para. 97) that it could be useful to refer to the lending rate laid down annually by the World Bank, particularly in cases of damage caused directly to a State without the intervention of private individuals.

30. He did not believe that a general case could be made for compound interest, except perhaps in very exceptional circumstances when that was the only way to achieve full compensation. That appeared to be the only conclusion to be drawn from the *Norwegian Shipowners' Claims* and *British Claims in the Spanish Zone of Morocco* cases referred to in the report (*ibid.*, paras. 98 and 100-101).

31. Unfortunately, draft article 9 dealt only partially with the problem of interest: it referred only to the date from which it was payable and the date when it ceased to be payable and merely touched on the complex issue of compound interest. He believed the article should be redrafted to specify the circumstances in which interest was payable and the exceptional circumstances in which the award of compound interest should be considered.

32. Referring to chapter III of the report, on satisfaction, he said that to the extent that reference was being made to attacks on diplomatic agents, diplomatic premises or State property by private individuals, agents of another State or uncontrolled mobs, two problems arose: that of material damage to the State concerned; and that of injury to what had been described as the State's dignity, honour or prestige. The first case involved the same principles as those dealt with in regard to *restitutio in integrum*, and pecuniary compensation was clearly called for. In the second case, satisfaction could take many forms, such as expression of regrets, apologies, payment of symbolic amounts or punitive damages, and punishment of the perpetrators.

33. The question was whether such satisfaction could take the form of punitive or humiliating demands. The Special Rapporteur referred to many cases of humiliating conditions imposed by the then great Powers upon other States on which they had imperial or colonial designs, such as the case of the Boxer uprising (*ibid.*, para. 124), and described a practice that would be totally unacceptable today. Other forms of satisfaction which must now be considered outmoded and unacceptable included saluting the flag and expiatory missions.

34. The arbitral tribunal in the "*Rainbow Warrior*" case had found a more modern form of satisfaction. In paragraph 8 of its decision, it had stated that it

> declares that the condemnation of the French Republic for its breaches of its treaty obligations to New Zealand, made public by the decision of the Tribunal, constitutes in the circumstances appropriate satisfaction for the legal and moral damage caused to New Zealand;[12]

and it had gone on to say, in paragraph 9, that

> in the light of the above decisions, [it] recommends that the Governments of the French Republic and of New Zealand set up a fund to promote close and friendly relations between the citizens of the two countries, and that the Government of the French Republic make an initial contribution equivalent to $US 2 million to that fund.[13]

In many ways, that decision indicated the proper scope of punitive damages for a deliberate breach of international law. As the Special Rapporteur rightly stated in the report: "The punitive or afflictive nature of satisfaction is not in contrast with the sovereign equality of the States involved." (*Ibid.*, para. 144.) That was particularly true when satisfaction was awarded through third-party machinery, as in the "*Rainbow Warrior*" case.

35. It would be entirely contradictory to provide that States could be held responsible for criminal acts, but then rule out sanctions, whether self-inflicted—as in the recent case of the apology offered by the Emperor of Japan to the Korean people—or imposed by the General Assembly or the Security Council. The imposition of mandatory sanctions against the racist régime of South Africa must be considered a legitimate form of punitive satisfaction by the international community.

36. In chapter IV of the report, the Special Rapporteur provided a sufficient basis for the remedy of "guarantees of non-repetition of the wrongful act". There had been cases where an international organization such as GATT or a human-rights body such as the European Court of Human Rights had demanded that a State amend its legislation. What must be emphasized was that, when any punitive remedy was imposed, international law permitted it only if it was done through third-party machinery. The principle of sovereign equality ruled out self-help in that regard. That point should be clearly brought out in draft article 10, paragraph 4 of which was of paramount importance. That paragraph should be retained, not deleted as Mr. Tomuschat had proposed at the pre-

[12] *Ibid.*, p. 579.

[13] *Ibid.*

vious meeting. There were, however, a number of drafting changes to be made in the article.

37. Mr. CALERO RODRIGUES, continuing the statement he had begun at the 2169th meeting, noted that, in chapters III and IV of his second report (A/CN.4/425 and Add.1), the Special Rapporteur made separate studies of the questions of satisfaction and guarantees of non-repetition of the wrongful act. Draft article 10 was entitled "Satisfaction and guarantees of non-repetition", but, in the text of the article, the words "assurances or safeguards against repetition" were used only once in paragraph 1 as a form of satisfaction, together with apologies, nominal or punitive damages and punishment of the responsible individuals. He agreed with the approach taken in the article and with the conclusion arrived at by the Special Rapporteur after a thorough examination of international jurisprudence and diplomatic practice that "guarantees against repetition constitute a form of satisfaction" (*ibid.*, para. 163), although he admitted that they performed a "relatively distinct and autonomous remedial function". On the basis of that reasoning, the reference to guarantees of non-repetition should be deleted from the title of article 10.

38. Satisfaction corresponded on the moral plane to reparation by equivalent on the material plane, being aimed at "putting things right" in a moral sense. On the material plane, that meant ensuring pecuniary compensation corresponding to the material damage or loss. Such equivalence was relatively easy to establish. However, if the damage was moral and if a State was injured in its "dignity, honour or prestige" (*ibid.*, para. 14), how was such a loss to be evaluated and how was the reparation owed to be calculated? It was not easy to establish either that there had in fact been "moral damage" or what the appropriate reparation would be.

39. In section C of chapter I, the Special Rapporteur considered the question of moral damage to the State as a distinct kind of injury in international law, stating that it consisted either in "the infringement of the State's right *per se*" or in "injury to the State's dignity, honour or prestige" (*ibid.*). In terms of legal philosophy, it could be accepted that the infringement of the State's right *per se* should be regarded as moral damage, as claimed by Anzilotti (*ibid.*, para. 14 *in fine*). Whenever an internationally wrongful act was committed, it could be said that legal injury was inflicted on one or more States. It could not be said that the injured State was entitled to claim satisfaction, unless satisfaction was given the very broad meaning of reparation. To redress the legal situation and wipe out the legal injury, the remedies available to a State were cessation and restitution in kind. For the purposes of the draft articles, satisfaction should be reserved for cases of moral damage or moral injury, in the narrow sense of "injury to the State's dignity, honour or prestige."

40. The words "dignity, honour or prestige" were a little high-sounding and might be open to criticism, but they were commonly used by the classic authors and no adequate alternatives had yet been proposed. They did give an approximate idea of those attributes of a State which could suffer "moral damage". It would be a good idea to include those words in paragraph 1 of article 10, which stated that satisfaction was due only "in the measure in which an internationally wrongful act has caused to the injured State a moral or legal injury". The word "legal" should be deleted and the expression "moral injury" should be given greater precision, by saying, for instance, that it was an injury to the State's dignity, honour or prestige. If the reference to "legal" injury were eliminated, the words "not susceptible of remedy by restitution in kind or pecuniary compensation" could also be deleted.

41. There were abundant examples of cases of moral injury, but the Special Rapporteur had wisely refrained from giving any in the text of article 10: they should be given in the commentary. In any case, the question of moral injury was highly subjective, especially where States were concerned. One State might feel morally injured by a certain act, while another State might consider itself only legally injured by the same act. The former would claim satisfaction, the latter restitution. Any decision should, of course, be based on the elements of the situation and on the interpretation to be given to the concepts of dignity, honour and prestige.

42. So much for the cause, the "moral injury". As far as the consequences were concerned, paragraph 1 of article 10 stated not only that satisfaction must be "adequate", but also that it might take the form of "apologies, nominal or punitive damages, punishment of the responsible individuals or assurances or safeguards against repetition, or any combination thereof". It was not very clear whether that was an exhaustive or an illustrative list. In his report, the Special Rapporteur, citing various authors, mentioned other possible forms of satisfaction, such as saluting the flag or expiatory missions, which could probably be included in the concept of apologies.

43. The Special Rapporteur also stated that a declaration of the wrongfulness of an act by an international body could be regarded as a form of satisfaction, and that concept was incorporated in paragraph 3 of article 10. It was doubtful, however, whether recognition of the wrongfulness of an act by an international body could constitute a form of satisfaction. The Special Rapporteur did not seem to have adduced any arguments in support of that idea. He referred to two writers, Morelli and Gray (*ibid.*, footnote 255), two arbitral awards, in the "*Carthage*" and "*Manouba*" cases (*ibid.*, paras. 113 *in fine* and 117), and the *Corfu Channel* case (Merits) (*ibid.*, para. 117). In the "*Manouba*" and "*Carthage*" cases, recognition of the fact that the State in question had violated an international obligation had been regarded as a serious sanction; and, in the *Corfu Channel* case, the ICJ had recognized that the United Kingdom had violated the sovereignty of Albania and had said that that declaration by the Court constituted in itself appropriate satisfaction. In the first two cases, it seemed that the recognition by an international tribunal that a wrongful act had been committed did in fact constitute an appropriate "sanction" for the "legal injury", since there had been no question of "moral injury". In the *Corfu Channel* case, however, the ICJ might have over-

looked the distinction between "legal injury" and "moral injury": a violation of sovereignty should indeed be considered an injury to the State's dignity, honour or prestige and, in such a case, recognition of the wrongdoing by a court would be enough to atone for the legal injury, but not to wipe out the moral injury.

44. Paragraph 4 of article 10 was a kind of warning: no claim for satisfaction could include humiliating demands or result in a violation of a State's sovereign equality or domestic jurisdiction. Such a provision was amply justified by historical examples, including those cited in the report (*ibid.*, footnotes 312 and 313). Satisfaction, a perfectly reasonable legal remedy, should not be distorted to become the expression of the power of the strong over the weak.

45. Paragraph 2 was slightly more complex. The two elements it indicated should be taken into account not only in choosing the form of satisfaction, but also in determining the degree of satisfaction. Those two elements were the importance of the obligation breached, and the existence and degree of wilful intent or negligence of the State which had committed the wrongful act. The reference to the "importance of the obligation breached" could be presumed to mean that account must be taken of the extent to which the wrongful act had caused moral injury or, in other words, had affected the injured State's dignity, honour or prestige. If that was the interpretation adopted and if an explanation was given in the commentary, he would have no objection to that part of article 10.

46. The second element, "the existence and degree of wilful intent or negligence", came within the realm of fault. The whole of chapter V of the report was devoted to "tentative remarks" on fault as a factor in the qualitative and quantitative determination of reparation. According to the Special Rapporteur, the Commission would have to face that issue during the elaboration of part 2 of the draft articles. He found that part of the report both interesting and intellectually stimulating, but it raised many issues which, although they were of considerable theoretical importance, had only limited value for the Commission's immediate purpose. The Special Rapporteur began by considering whether the articles of part 1 excluded fault from the constituent elements of an internationally wrongful act or whether, on the contrary, the Commission believed that fault was a *sine qua non* for wrongfulness and responsibility. In his own view, now was not the right time to consider that problem and he hoped that the Commission would not get bogged down by it even when it came to the second reading of part 1.

47. The Special Rapporteur then made a thorough and brilliant analysis of the "objective responsibility" approach of Anzilotti and Kelsen to the question of attribution, and of the differing view of Ago (*ibid.*, paras. 167 *et seq.*). He concluded that the attribution of an act to a State did not seem to be "an operation carried out by legal rules, notably by national or international law" (*ibid.*, para. 173) and maintained that the attribution of fault to a State was essentially a question of fact (*ibid.*, paras. 177-178). However, he then seemed to admit that the analyses presented thus far were irrelevant for the purposes of part 2 of the draft, stating: "Another matter, however, is the relevance of fault with respect to the legal consequences of an internationally wrongful act." (*Ibid.*, para. 180.)

48. Section C of chapter V of the report dealt with that "other matter", under the heading "The impact of fault on the forms and degrees of reparation". Where compensation was concerned, fault was dismissed as an element in the calculation. In the Special Rapporteur's words, "the doctrine is perhaps right in upholding the view that the absence, the presence and the degree of the so-called 'intentional element' should in no way affect the computation of compensation" (*ibid.*, para. 185). And, indeed, there was no reference to fault in draft article 8.

49. Finally, in section C.2 of chapter V, on "Fault and satisfaction (and guarantees of non-repetition)", the Special Rapporteur came to the only point which actually had a bearing on one of the draft articles. However, that part of the report was short and not very conclusive. The Special Rapporteur said he had the "impression" that fault "in a minor or major degree" had played a significant role with regard to the coming into play of the obligation of satisfaction and with regard to "the quality and number of the forms of satisfaction claimed and in most cases obtained" (*ibid.*, para. 188). Unfortunately, he found that disappointing. He would have expected that the Special Rapporteur, who had done so with such competence in other parts of the report, would have assisted the Commission in deciding on the text he was proposing for the second part of paragraph 2 of article 10.

50. The Special Rapporteur had entitled chapter V "Tentative remarks" and his own remarks on it would also be tentative. Although there was no mention of fault in part 1 of the draft articles, and even admitting that fault had no role to play in reparation by equivalent, he was inclined to recognize that fault on the part of the State which had committed the wrongful act should be taken into account in the assessment of satisfaction, as suggested in paragraph 2 of draft article 10. On the other hand, he could see some merit in Mr. Graefrath's suggestion (2168th meeting) that article 10 should not be limited to a reference to fault, but should also indicate the other factors or elements to be taken into account in determining the forms and degrees of satisfaction. In his own view, those factors should be mentioned in addition to the importance of the obligation breached.

51. The CHAIRMAN, speaking as a member of the Commission, said that the Special Rapporteur's second report (A/CN.4/425 and Add.1) was the result of in-depth research and a scholarly study of the abundant literature on the topic. Unfortunately, the jurisprudence and practice of the nineteenth century and the early part of the twentieth century, as reflected in the available literature on the topic, illustrated to a large extent the intervention and gunboat diplomacy practised by the then major Powers—the same ones as now—under the cloak of diplomatic protection for

their citizens abroad. In fact, as a discipline, State responsibility and diplomatic protection of citizens abroad were practically one and the same thing in traditional international law.

52. As the Special Rapporteur noted with regard to satisfaction, "practice shows that powerful States tend to make requests not compatible with the dignity of the wrongdoing State or with the principle of equality" (*ibid.*, para. 110). The Special Rapporteur cited a number of writers who considered that satisfaction had often been used by the European Powers as a pretext for intervention and that the misuse of satisfaction for suppression and humiliation of whole peoples had been typical of the period of imperialism (*ibid.*, footnote 276). That state of affairs was not confined to satisfaction, however: the forms of reparation, and particularly reparation by equivalent, were of the same nature. Indeed, during the period of imperialism, might had been right, and that had resulted in a completely distorted view of things. The nationals of certain Powers, who had disregarded and wantonly trampled on the laws and culture of their host countries and had exploited, oppressed and humiliated the peoples of those countries, had often been regarded as victims, while the local population, which had reacted in self-defence against the abhorrent behaviour of foreign nationals, had been regarded as culprits who had violated the rights of those foreigners. The countries of origin of those foreigners had espoused the claims of their citizens and had made humiliating demands on the so-called wrongdoing States, against which they had threatened to use force. It was precisely in reaction to that law of the jungle that eminent Latin American jurists and statesmen had put forward the "Drago Doctrine", the "Calvo Doctrine" and other more or less similar doctrines, which were a remarkable contribution on the part of the peoples of Latin America to the modern law of nations, but which the defenders of traditional international law, in other words the public law of Europe, had never recognized as part of general international law.

53. The Special Rapporteur dealt with the Boxer Rebellion case (*ibid.*, para. 124) from the traditional standpoint of the law of State responsibility, that was to say, as a case that illustrated the legal consequences of a wrongful act, satisfaction in that case being a form of reparation. The Special Rapporteur, however, showed a degree of sympathy for the Chinese people, since he recognized that what he called the "injured States" had "taken not little advantage, in dealing with the matter and claiming severe measures of satisfaction, of their military, political and/or economic superiority" (*ibid.*, para. 124 *in fine*). In the Special Rapporteur's view, satisfaction as a form of reparation was punitive in nature, and that was logically tantamount to saying that China should be punished for the wrongful act, no matter how disproportionate the punishment might be to the wrong suffered.

54. He did not blame the Special Rapporteur, for whom he had the greatest respect as a lawyer, for that approach. One could not expect legal scholars nurtured in the Western tradition to have a full understanding of the history of the Chinese revolutionary movement. For the Chinese people, however, the case of the Boxer Rebellion had not been a case of State responsibility, but, rather, a typical example of armed intervention and aggression by eight imperialist Powers. The Boxer Movement had been a reaction against the gangsterism of imperialist opium traders, ruthless exploitation of Chinese labour, destruction of Chinese culture under the cloak of religion, compulsory appropriation from Chinese peasants by foreign traders and missionaries of vast areas of farming lands, often at a nominal price, the killing of Chinese persons by foreigners under the protection of extraterritorial consular jurisdiction, and medical experiments on many Chinese persons in hospitals run by imperialists. According to the imperialist logic, the interests and property of those Western nationals had to be protected and the Boxers' rebellion suppressed. As the imperialist Government had been unable to suppress the revolutionary movement, the combined armed forces of eight Powers, small and large, had intervened to put down the movement and had imposed on the Chinese people a humiliating treaty, which was quoted in detail in the Special Rapporteur's report. The Boxer Movement had been an integral part of the revolutionary movement of the Chinese people against feudal rule and imperialist aggression which dated back to the first opium war of 1840 and which had lasted for over 100 years, culminating in the establishment of the People's Republic in 1949.

55. He wished to make it quite clear that, in his view, the codification of the part of the law of State responsibility under consideration could not be based on the jurisprudence and the practice of imperialist Powers of a bygone era. The Commission must look to the future, while learning the lessons of the past, and engage in the task of progressive development, with due regard for the rule of law in international relations, the sovereign equality and peaceful coexistence of States, as well as the right to development, particularly of the developing countries, in the context of the new international economic order.

56. In his report, the Special Rapporteur dealt in detail with reparation by equivalent and satisfaction, including guarantees of non-repetition, as forms of reparation for an internationally wrongful act. He had no difficulty in accepting reparation by equivalent and satisfaction as forms of reparation as such. There were, however, a number of concepts underlying those forms of reparation which should be reassessed in the light of the principles he had just mentioned.

57. To take the example of so-called "full compensation", which the Special Rapporteur had not defined, it was apparent from the Special Rapporteur's treatment of reparation by equivalent that he assimilated it to full compensation. The elements of which reparation by equivalent consisted, apart from restitution in kind, included pecuniary compensation for moral and material damage assessed in accordance with strict criteria such as direct and indirect damage, *lucrum cessans*, including unlawful expropriation of a going concern, interest rates calculated from the date of the damage caused and payment of compound interest. When applied to relations between developed States,

the concept of full compensation or reparation by equivalent might not create any problems. When it was demanded of a developing country by a developed country, however, full compensation might prove to be excessively onerous and might deprive the developing country of its right to development. There was no such thing as unlawfulness when it came to the nationalization or expropriation of a foreign enterprise, other than in the case of non-payment of compensation. If, in the event of nationalization, a small developing country had to pay compensation according to the criteria conceived by the Special Rapporteur, that country might become bankrupt, for often the market value of a transnational corporation and its annual profits exceeded the country's gross national product. That was why the instruments on the new international economic order spoke of "appropriate compensation" in accordance with the legislation of the nationalizing State. It should be remembered that the idea of full, prompt, adequate and effective compensation for nationalization had first been mooted by a great Power during the 1938 Mexican expropriations. Full compensation as conceived by the Special Rapporteur and when demanded of a small country by a big Power was not compensatory, but essentially of a punitive nature. In that connection, the principle of preferential treatment for developing countries should prevail in relations between developed and developing countries. Only thus could reparation by equivalent reflect the principle of the sovereign equality of States—in other words, equality through inequality.

58. He also stressed that neither reparation by equivalent nor satisfaction should be of a punitive nature. He agreed with Mr. Tomuschat, who, in a recent article, had written:

> ... In their mutual relationships, which are characterized by sovereign equality, States are not entitled to sit as criminal judges, the victim State acquiring a right to "try" the author State. Thus, financial compensation is acceptable only as a form of reparation for the loss incurred by the injured State.[14]

That was also true of satisfaction.

59. Finally, referring to paragraph 97 of the second report, he pointed out that, since 1980, the World Bank's interest rate had been laid down not on an annual, but on a quarterly basis.

60. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he would like to provide an explanation on a point raised by Mr. Shi concerning the reference in his second report to the Boxer Rebellion (A/CN.4/425 and Add.1, para. 124). He had mentioned the case with the sole intention of underlining the arrogance and violence with which the Western Powers had behaved towards China. He had felt bound to do so, however, and would continue to do so with the same objective. Moreover, he had the greatest respect for the Chinese people. In drafting his reports he was always careful to blame his own country whenever he deemed it necessary and warranted, whatever Government was responsible for the facts he used as examples. He had, for instance, referred to the *Tellini* case (*ibid.*, para. 124 and footnotes 314 and 439 *in fine*), making it quite clear that a fascist country had acted arrogantly towards Greece: it had even gone so far as to bomb the island of Corfu. He drafted his reports in an objective spirit without taking account of his own nationality, since, for him, mankind came before his country.

61. Mr. MAHIOU said that the thought which had gone into the Special Rapporteur's second report (A/CN.4/425 and Add.1) and the quality of the analysis, research, information and conclusions it contained made it truly comprehensive. The historical and theoretical approach also introduced clarity and certainty into a topic replete with difficult concepts, such as satisfaction, material and moral damage, direct and indirect damage, proven and potential damage, and the idea of causality. The wealth of information and the depth of the analysis nevertheless called for two comments.

62. First, the Special Rapporteur had focused on a somewhat distant period: the end of the nineteenth century and the beginning of the twentieth century. That was understandable from the point of view of arbitral practice, which had been abundant at that time and was worth studying for the lessons it could provide. He was not entirely satisfied with regard to the State practice referred to. It would be even more valuable to look at recent practice. The Special Rapporteur himself pointed out that some cases were slightly outdated, including the one to which Mr. Shi had just referred and which reflected a particular approach to international law in which the balance of power had perhaps been the dominant factor.

63. Secondly, in his research, the Special Rapporteur had given pride of place to an aspect which was admittedly very important, but which was only one part of international law, namely the treatment of foreigners. Of course, that question had frequently been dealt with in arbitral practice and should therefore be taken into account; but were all the rules that had been formulated so broad in scope that they could be applied to any area of international law? Other international-law topics should perhaps be taken into consideration, such as inter-State relations and international disputes.

64. The Special Rapporteur had dwelt at some length on the possibility of there being rules of international law relating to reparation by equivalent and on the importance to be attached to progressive development, so much so that the reader might be somewhat puzzled. For example, the Special Rapporteur said at one point that there were no very detailed rules in the matter, yet admitted that there might be "more articulate rules" (*ibid.*, para. 28). He also said that it would be inadvisable to produce any such rules as a matter of progressive development, while recognizing the possibility of reasonably developing such rules. He personally did not think that there was any need to develop precise and detailed rules in that regard and would show why when dealing with the draft articles one by one.

65. With regard to draft article 8, paragraph 1, on the principle of reparation by equivalent, he preferred

[14] C. Tomuschat, "Some reflections on the consequences of a breach of an obligation under international law", *Im Dienst an der Gemeinschaft: Festschrift für Dietrich Schindler* (Basel/Frankfurt, Helbing and Lichtenhahn, 1989), p. 162.

alternative A, which seemed more concise, subject, of course, to possible drafting amendments. In paragraph 2, which was intended to identify the damage, whether material or moral, to be compensated for, the Special Rapporteur laid down the condition that the damage should be economically assessable, and that was understandable from a practical point of view. He was not sure, however, whether the condition should be stated as a rule, because its interpretation and implementation might give rise to serious differences of opinion. He recalled that compensation for moral injury was sometimes refused under the internal law of certain countries, since no sum of money could compensate for moral suffering. It was a fact, however, that moral damage was increasingly being taken into account for the purpose of compensation, even though the grounds for compensation were still uncertain. He therefore did not think that any rigid rule could be laid down in that regard, even if it meant that the codification would be incomplete.

66. Referring to paragraph 3, on loss of profits, he noted that the Special Rapporteur showed that the study of the concept was sometimes hampered by confusion with the question of how to distinguish between direct and indirect damage. The Special Rapporteur provided the necessary explanations to define the concept and find solutions. He shared the Special Rapporteur's view that the answer lay in two presumptions: that of the existence of profits and that of a causal link with the wrongful act. In the light of those two presumptions, however, the wording of paragraph 3 was not satisfactory. The obligation to compensate was stated in very broad terms, whereas, in the report, the Special Rapporteur was more guarded in referring to the "indemnifiability in principle of *lucrum cessans*" (*ibid.*, para. 66). Loss of profits should therefore be qualified by one means or another. It should also not be forgotten that the assessment of damage sometimes raised formidable problems, as in the case of the Chilean nationalizations.

67. Paragraph 4 dealt with the distinction between direct and indirect damage. With regard to causality, there was both logic and rigour in the formula proposed by Bollecker-Stern (*ibid.*, para. 43) and it was a good illustration of the problem, but it would not resolve the Commission's dilemma, since the chain of causality could not be pursued *ad infinitum*. The role of a rule of law was not to be scientifically rigorous, but rather to decide issues and find solutions. A choice had to be made among the three traditional approaches to causality referred to by the Special Rapporteur, who had opted for that of equivalent conditions, whereby any act without which the damage would not have occurred was a cause of the damage. A bolder and more radical approach would be that of proximity, whereby only the last event which had made the damage possible was its cause. Personally, he would prefer the intermediate solution of adequate causality, according to which only an act which could reasonably have made the damage possible was the cause of the damage. He therefore did not think that it was necessary to enunciate the uninterrupted causal link in a rule: it would be preferable to adopt a more flexible solution without any such stipulation, the content of the rule being left to practice to define.

68. Paragraph 5 dealt with concomitant causes. In his explanations, the Special Rapporteur admitted that it would be pointless to try to find any rigid criteria in that regard and even noted that it would be absurd to think in terms of laying down a "universally applicable formula" (*ibid.*, para. 46). While agreeing with that view, he wondered whether concomitant causes should be covered at all in article 8. Like Mr. Tomuschat (2170th meeting), he thought that they should perhaps be covered in a separate provision, especially as they raised the problem of the sharing of responsibility and, indeed, that of diminished responsibility or exoneration from responsibility. The conduct of the injured State could thus have an influence on the amount of compensation. It was a well-established principle of international law that losses should be minimized and that point was mentioned briefly by the Special Rapporteur in his report. A separate provision should therefore deal with that aspect, together with the questions of the sharing of responsibility and, possibly, diminished responsibility and exoneration from responsibility.

69. With regard to draft article 9, although he agreed with the principle of awarding interest, he had some difficulty in following all the proposed solutions, especially concerning the *dies a quo* and compound interest. The Special Rapporteur examined the various possibilities for the date from which interest should run. The choice was between the date of the damage, the date on which the amount of compensation was fixed and the date of the claim. The Special Rapporteur had opted for the first solution, but he himself doubted whether it was necessary to lay down so rigid a rule. Practice in that area tended to vary, even in international commercial relations, where the concept of interest was particularly prominent. No precise solution emerged from the arbitration cases dealt with by the International Chamber of Commerce: the date varied from one award to another. If it was absolutely necessary to establish a rule, he would prefer the date on which compensation was claimed, for reasons which the Special Rapporteur explained very well: the date of the claim served as a kind of notice to the debtor State, which was thereby officially informed that it was under an obligation. If no satisfaction was obtained, that was the date from which interest would run. Moreover, the claimant must not be guilty of negligence by allowing time to elapse before filing the claim, which would cover the interim period.

70. The Special Rapporteur also invited the Commission to decide on the interest rate to be chosen (A/CN.4/425 and Add.1, para. 97). There again, he wondered whether it was wise to go so far, especially since international exchange rates tended to fluctuate. The rates set by international financial institutions could of course be used, but no binding rule could be laid down. The bodies responsible for calculating compensation must be given some room for manoeuvre to decide on the interest rate in the light of the circumstances.

71. He had reached a different conclusion from the Special Rapporteur with regard to compound interest: he did not think that it was essential and it might even lead to unfair results. He therefore doubted whether it was wise to deal with that question in the draft articles.

72. With regard to satisfaction, dealt with in chapter III of the report and in draft article 10, he basically agreed with the Special Rapporteur's approach and with his analysis and conclusions. Satisfaction must be regarded as a specific form of reparation, along with other forms of reparation, cessation, restitution in kind and reparation by equivalent. The fact that the broad and technical meanings of satisfaction had sometimes been confused should prompt the Commission to define the concept more clearly. Once the concept had been identified, its manifestations must, of course, be defined as well, as the Special Rapporteur had done in paragraph 1 of article 10.

73. The Commission had rightly paid particular attention to punitive damages, because the afflictive and punitive aspect was controversial. If he correctly understood the explanations given by the Special Rapporteur, especially in section D of chapter III, the afflictive aspect applied only to satisfaction and was thus an element which made satisfaction autonomous *vis-à-vis* other modes of reparation. Other members of the Commission challenged that view and thought it unwise to introduce any punitive connotation. He thought that both views were correct to some extent, for the reasons he would explain. On the one hand, the basis of the rules of reparation should be as objective as possible, since responsibility in international law must be concerned essentially with reparation for damage and must not seek to introduce the idea of sanctions, with all the subjective aspects it involved and the complications it might cause in the codification and application of the relevant rules. On the other hand, however, any judgment of any kind involving an order for reparation was necessarily punitive in nature, just as the wrongful act hinged on the concept of fault. Responsibility could arise from a wrongful act which was an international crime (art. 19 of part 1 of the draft), and it was obvious that such a crime would have a bearing on the régime of reparation to be applied. It was therefore a moot point whether it was useful for the topic, and at the stage of draft article 10, to introduce the afflictive aspect or whether it would not be better to come back to that aspect when the time came to deal with the consequences of an international crime. He inclined to the latter view and thought that damages could be dealt with in paragraph 1 of article 10 without reference to their afflictive or punitive nature.

74. As for guarantees of non-repetition, he was once more broadly in agreement with the Special Rapporteur's explanations and illustrations, which, like the arguments of the previous Special Rapporteur, demonstrated the relevance of such a rule.

75. Lastly, with regard to the limits which could or should be placed on satisfaction, the Special Rapporteur was right to draw attention to some historical examples of the abuses and dangers connected with some forms of satisfaction. It was therefore appropriate to set limits on satisfaction, as had been done in paragraph 4 of article 10. Some members of the Commission had questioned whether humiliating demands should be referred to in that paragraph. His own view was that, even if such demands were rare in the modern world, care must be taken to ensure that reparation would not extend to them in future and that certain types of conduct which were thought to belong to the past were not engaged in again through certain forms of satisfaction. The problem that arose was how such a provision was to be drafted.

76. In conclusion, he said that draft articles 8 to 10 should be referred to the Drafting Committee.

The meeting rose at 1 p.m.

2172nd MEETING

Tuesday, 12 June 1990, at 10 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

State responsibility (*continued*) (A/CN.4/416 and Add.1,[1] A/CN.4/425 and Add.1,[2] A/CN.4/L.443, sect. C)

[Agenda item 3]

Part 2 of the draft articles[3]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

[1] Reproduced in *Yearbook ... 1988*, vol. II (Part One).

[2] Reproduced in *Yearbook ... 1989*, vol. II (Part One).

[3] Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 which were adopted on first reading, appears in *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

Articles 1 to 5 of part 2 of the draft (Content, forms and degrees of international responsibility), which were provisionally adopted by the Commission at its thirty-fifth and thirty-seventh sessions, appear in *Yearbook ... 1985*, vol. II (Part Two), pp. 24-25. For the texts of the remaining draft articles of part 2, articles 6 to 16, referred to the Drafting Committee by the Commission at its thirty-sixth and thirty-seventh sessions, *ibid.*, pp. 20-21, footnote 66. For the texts of the new articles 6 and 7 of part 2 referred to the Drafting Committee at the forty-first session, see *Yearbook ... 1989*, vol. II (Part Two), pp. 72-73, paras. 229-230.

Articles 1 to 5 and the annex of part 3 of the draft ("Implementation" (*mise en œuvre*) of international responsibility and the settlement of disputes) were considered by the Commission at its thirty-eighth session and referred to the Drafting Committee. For the texts, see *Yearbook ... 1986*, vol. II (Part Two), pp. 35-36, footnote 86.